Aria Resort & Casino, LLC d/b/a Aria *and* International Union of Operating Engineers, Local 501, AFL–CIO, Petitioner. Case 28–RC–154093

November 3, 2015

ORDER DENYING REVIEW

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Employer's request for review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.[1]

In denying review, we agree with the Regional Director's reliance on *Advance Pattern Co.*, 80 NLRB 29 (1948). Under *Advance Pattern* and its progeny, the Board has consistently held that so long as a question concerning representation in fact exists, the Board will not dismiss a petition simply because—as in this case—a petitioner fails to indicate on the petition form whether it has requested recognition and the employer has declined to extend recognition. The Petitioner's request for recognition and the Employer's declination at the hearing were sufficient to establish the existence of a question concerning representation. See, e.g., *Alamo-Braun Beef Co.*, 128 NLRB 32, 33 fn. 5 (1960).[2] To dismiss the petition under these circumstances would be an abrogation of the Board's statutory duty—set forth in Section 9(c)(1) of the Act—to resolve questions concerning representation.

Contrary to the Employer's contentions, the Board's continued adherence to this longstanding interpretation of its own rules and regulations is not arbitrary and capricious, and the Board has stated that a failure to indicate on a petition form that a request for recognition was made "does not prejudice" employers. *Dependable Parts, Inc.*, 112 NLRB 581, 582 (1955); *Economy Furniture*, 122 NLRB 1113, 1114 fn. 2 (1959). See generally *NLRB v. Superior Cable Corp.*, 246 F.2d 539 (4th Cir. 1957) (per curiam) ("[I]t would be a senseless technicality to hold that the representation proceeding should have been dismissed and the parties required to initiate a new proceeding, where the demand and refusal of recognition had been established at the hearing itself and the defect in the petition could be cured and was cured by amendment."). Moreover, nothing in the Board's recent amendments to its rules and regulations purports to alter its longstanding practice in this area.

Dated, Washington, D.C. November 3, 2015

Mark Gaston Pearce, Chairman

Philip A. Miscimarra Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

DECISION AND DIRECTION OF ELECTION

International Union of Operating Engineers, Local 501, AFL–CIO (the Petitioner) seeks to represent a unit of all full-time and part-time tram operators employed by Aria Resort & Casino, LLC d/b/a Aria (the Employer) at its Las Vegas, Nevada facility. The Employer asserts that the petition does not satisfy the mandatory obligations in Section 102.61(a)(8) of the Board's Rules and Regulations.[1] The parties do not agree on a date for an election, as the Petitioner requested June 26, 2015, while the Employer requested July 7 or 8, 2015, based on the number of employees working on those dates.

A hearing officer of the Board held a preelection hearing in this matter and the parties orally argued their respective positions prior to the close of the hearing. As described below, based on the record and relevant Board case, including the Board's decision in *Advance Pattern Co.*, 80 NLRB 29 (1948), I find that the petition is sufficient.

The Employer's Operations

The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act. The Employer is a Nevada corporation with offices and place of business in Las Vegas, Nevada, which is the only operation involved herein, where it operates a casino and hotel, and provides convention and meeting spaces, restaurant services, enter-

[1] Pertinent portions of the Regional Director's Decision and Direction of Election are attached.

[2] See also, *Florida Tile Industries*, 130 NLRB 897, 898 (1961).

Chairman Pearce notes that, indeed, "[t]he filing of a petition itself constitutes a sufficient demand for recognition." Id. and cited cases. See also *Alamo-Braun Beef*, 128 NLRB at 33 fn. 5.

[1] A petition for certification when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following: [a] statement that the employer declines to recognize the petitioner as the representative within the meaning of Sec. 9(a) of the Act or that the labor organization is currently recognized but desires certification under the Act.

tainment services, and other amusement services.

The petitioned-for unit is comprised of six employees whose job assignment is limited to operating the tram at the Employer's facility. At hearing, the parties agreed to the description for and the appropriateness of the petitioned-for unit.

At hearing, the Employer again raised its objection to the preelection hearing and petition for the reasons expressed in its motion to dismiss filed on June 16, 2015. It averred that it never argued that the Petitioner must request recognition before it could file a petition, and that its argument was limited to the sufficiency of the petition itself. The Employer's motion to dismiss reads otherwise.[2] The Employer argues that the petition fails to state whether the Petitioner requested recognition before filing its petition, asserting that this is a requirement pursuant to Section 102.61(a)(8) of the Board's Rules and Regulations and Section 7(a) on Form NLRB-502(RC) (RC Petition). As explained in the Order denying Employer's motion to dismiss petition (Order) on June 19, 2015, there was no merit to the Employer's arguments that the Petitioner failed to comply with the requirements in the Board's Rules and Regulations or that the filing of the petition was contingent on the Petitioner making an offer of recognition to the Employer.

Section 102.61(a), which addresses petitions for certifications, does not impose any condition requiring a petitioner to demand recognition from the Employer under Section 9(a) of the National Labor Relations Act (the Act) before filing a petition for certification. Similarly, Section 102.61(a)(8), which describes the contents that must accompany a petition for certification at the time of service, does not impose this demand for recognition requirement. Although the Employer asserts that the petitioner must demand recognition under these rules, Section 102.61(a)(8) simply does not support this argument. Rather, Section 102.61(a)(8) describes that the petition for certification form provides a section for the petitioner to note one of two scenarios: (a) whether a request for recognition has been made and whether the employer declined to recognize the petitioner as a representative under Section 9(a) of the Act, or (b) whether the petitioner is currently recognized but desires certification. There is nothing on the form stating that the request for recognition action is a condition precedent for filing a valid petition. Moreover, each of the Employer's arguments is contrary to Board law. *Advance Pattern Co.*, 80 NLRB 29, 31–38 (1948) (rejecting motion to dismiss and rejecting a strictly literal interpretation of language nearly identical[3] to Sec. 102.61(a)(8) as it "can produce only the atmosphere of a tensely litigated law suit in which all sides will be quick to seize upon technical defects in pleadings to gain substantive victories").[4]

For the reasons discussed above, the Employer has not established that the Petitioner has failed to comply with its obligations, and I am again denying the Employer's Motion to Dismiss.

. . . .

[2] "In this case, the petition does not satisfy the mandatory obligations imposed by Sec. 102.61(a). The petition does not include a 'statement that the employer declines to recognize the petitioner as the representative within the meaning of Sec. 9(a).' The Union left Sec. 7 of the petition completely blank and failed to ever request that the Employer recognize it as the representative of the petitioned for unit."

[3] The language in the Board's rules at the time did not contain the additional provision "or that the labor organization is currently recognized but desires certification under the Act."

[4] "[W]e adhered faithfully to the practice of deciding on the merits any case in which it appeared that a real question concerning representation *existed*, despite the fortuity that a petition might have disclosed faulty, incomplete, inaccurate, or otherwise imperfect information. We found that the Board could only achieve a fair measure of success in performing its obligations by following that policy." Id. at 31.